

REMARKS

Applicants gratefully acknowledge Director Garber for courtesies extended in a telephone interview dated April 20, 2010, wherein Applicants' representative questioned the propriety of the continuing prosecution under the "second set of eyes" (SSE) after-allowance review process, since there appears to be no rules of engagement (e.g., no procedures in place defining conduct of this prosecution by the USPTO) and no decision maker (e.g., based on several past telephone interviews with Examiner Frejd and SPE Shah, neither of them have decision capability during this phase and Applicants are expected to cancel claims based on an invisible decision maker). It has been almost a year and a half since the Notice of Allowance was mailed by the USPTO on December 22, 2008, and the office actions are becoming increasingly meaningless relative to the transparency and constraints of normal patent prosecution.

It further appears, if the Examiner's/SPE's descriptions of the SSE process are assumed to be correct, that the SSE process is nothing but a "groupthink" phenomena wherein a presumably senior examiner has evidently been anointed to occupy a throne somewhere deep in the bowels of the USPTO with authority to simply refuse that allowance continue until claims are further narrowed, and the Applicant, the Examiner, the SPE, and the Director are not permitted to challenge the anointed sovereign's subjective opinion of claims being "too broad", even if the "too broad" subjective opinion is based upon a failure by the SSE to properly understand the technical terms being used in the claims, in view of the description in the specification.

However, it is noted that, during the above-mentioned telephone interview, Director Garber indicated that it is, in fact, the Examiner who is the decision maker during the SSE prosecution, not an anonymous senior Examiner having arbitrary rights to deny allowance until claims are narrowed. Applicants' representative pointed out that Director Garber's statement directly contradicts previous comments of both Examiner Frejd and SPE Shah.

As Applicants' representative further explained to Director Garber during this interview and previously explained to SPE Shah and Examiner Frejd, Applicants cannot narrow the claims of record without some reasonable rationale being placed on record, since the public has to be aware of exactly what Applicants have surrendered by reason of these claim changes and since Applicants will not be able to recapture subject matter that has been surrendered, even if that

surrender occurred under duress or misrepresentation.

Furthermore, as explained during this telephone interview and discussed below, the latest Office Action in this prosecution would likely invalidate any patent rights that ultimately would issue unless the Office provides corrections on the record to statements made in this latest Office Action.

Applicants' representative then pointed out that the two rejected claims (*e.g.*, claims 5 and 8) clearly differed from the cited reference by reason that paragraph [0004] of Chiang does not relate to a min-max problem. The Examiner's response in this regard, in paragraph 5 beginning at the middle of page 5 of the Office Action, is based entirely upon the improper premise that a technical term in a claim can be given any meaning the Examiner chooses to give that term, even if such meaning is inconsistent with the definition and discussion in the specification. Moreover, relative to claim 5, paragraph [0004] has no suggestion whatsoever of receiving data for purpose of populating a model of the problem.

Director Garber agreed to get back with Applicants' representative within a "couple of days", including, if necessary, setting up a telephone or personal interview with the appropriate decision maker.

It is noted that Director Garber did not get back with Applicants' representative prior to filing this response on the due date of May 3, 2010.

Claims 1-6, 8-17 and 19-22 are all of the claims currently pending. New claim 22 is added, claims 7 and 18 are canceled, with claim 7 being newly canceled. In the Office Action mailed on February 3, 2010, claims 1-4, 9-17, and 19-21 are indicated as allowed. Applicants gratefully acknowledge the Examiner's indication that claims 6 and 7 would be allowable if rewritten in independent format.

Claims 5 and 8 stand rejected under 35 USC §103(a) as allegedly unpatentable over US Patent Application Publication No. 2003/0220772 to Chiang, et al. Claim 7, indicated as containing allowable subject matter, has been canceled by reason of the incorporation of its subject matter into rejected independent claims 5 and 8.

Applicants respectfully traverse this rejection based on Chiang, even if the Examiner is permitted to ignore the plain meaning of claim language during the SSE after-allowance prosecution.

I. THE CLAIMED INVENTION

In one aspect and as described in the specification and defined by, for example, claim 5, the present invention is directed to an apparatus for calculating a global optimization for a problem to be optimized. A receiver receives data related to the problem, for populating a model for the problem. A data converter converts the received data into data structures that thereby populates the model.

A first calculator, as executed by a processor on the apparatus, provides a plurality of minimum values of the model. A second calculator, as executed by the processor, locates a global optimum value for the problem, given the plurality of minimum values. A transmission port sends the global optimum to at least one of a display device, a printer, and a memory.

Conventional techniques for arriving at a global optimum, as described beginning at line 19 of page 2 of the specification, are NP-hard and difficult to resolve in a reasonable time. These conventional methods include Simulated Annealing, Genetic Algorithm, or other Monte Carlo type techniques.

The claimed invention, on the other hand, provides a method to find a global optimum to a minimum-maximum problem by first calculating a plurality of minimum values and then using these minimum values to locate the global optimum value.

II. THE PRIOR ART REJECTION

The Office alleges that Chiang renders obvious the claimed invention defined by claims 5 and 8.

Applicants again respectfully disagree, since Chiang's algorithm is not directed to solving a min-max problem, as clearly required by the plain meaning of the language of the first claim limitation and as Applicants have explained now multiple times. Rather, Chiang's method is directed to first finding all the local optimums and then determining from that group of local optimums the one local optimum that is globally optimal.

In the latest Office Action, the rejection of claims 5 and 8 is now based upon ignoring the term "min-max" and, in paragraph 2.3, the Examiner redefines this term as equivalent to "... *pertaining to 'constrained optimization in any specific application.'*" Thus, the Examiner appears

to declare that, during the SSE after-final prosecution, the definition of claim terms can be ignored by focusing instead on language from the specification that is taken out-of-context from the definition actually provided therein and then comparing that broader language with language in the cited reference and somehow then concluding that the claim language is equivalent to the allegedly comparable broad language of the cited reference.

In response, Applicants respectfully disagree that technical terms of art, expressly defined in the specification, can be blatantly ignored during SSE prosecution since such out-of-context redefinition fails to perceive the claimed invention from the perspective of one of ordinary skill in the art. Moreover, this taking of wording does nothing except confuse the public as to the meaning of this term as clearly defined in the specification and understood in the art, since the Examiner has gone outside the perspective of one of ordinary skill in the art during the SSE prosecution.

However, in an effort to expedite prosecution, Applicants have eliminated the term “min-max” from rejected claims 5 and 8 and incorporated claim wording that is consistent with the Examiner’s rephrasing of the claim wording and have incorporated description from allowable claim 7, thereby clearly placing both claims 5 and 8 into condition for immediate allowance.

Applicants do intend, however, that the revised claim wording for these two claims be interpreted by one having ordinary skill in the art as clearly encompassing more than the min-max problem, as reflected by adding new dependent claim 22.

Along this line, it is noted that paragraph [0004] of Chiang clearly does not make any reference to populating a data for a model, contrary to the Examiner’s characterization in paragraph 2.2 of the latest Office Action.

Therefore, Applicants submit that there are elements of the claimed invention that are not taught or suggested by Chiang, and the Office is respectfully requested to reconsider and withdraw this rejection.

III. FORMAL MATTERS AND CONCLUSION

In view of the foregoing, Applicants submit that claims 1-6, 8-17, and 19-22, all the claims presently pending in the application, are patentably distinct over the prior art of record and are in condition for allowance. The Examiner is respectfully requested to pass the above

application to issue at the earliest possible time.

Along this line, Applicants request that the Office expressly correct on the record incorrect statements and contradictions made in the Office Action mailed on February 3, 2010, since, as discussed during the above-mentioned telephone interview with Director Garber, these contradictions would provide a document from the USPTO that, if presented to a Court during a litigation, is self-impeaching by reason of its internal contradictions, thereby arguably presenting to the Court a document clearly demonstrating that the USPTO had no logical basis or creditability in its issuance of a patent related to this application.

That is, the following errors and/or contradictions are expected to be expressly addressed by the Office in the next Office Action:

1. In paragraph 2.2 on page 3 of the Office Action, the Examiner alleges that paragraph [0004] of Chiang teaches receiving data for populating a min-max model. Applicant respectfully submits that this paragraph [0004] does not suggest populating a model, let alone populating a min-max model. The Office is requested to point to specific wording in this paragraph that provides reasonable support of his allegation.

2. In paragraph 2.3, beginning on page 3 of the Office Action, the Examiner then contradicts the above allegation, conceding that Chiang does not disclose a min-max problem but, instead, ignores the technical meaning of the term “min-max” in the specification and alleges that this term is equivalent to the wording “... *pertaining to ‘constrained optimization in any specific application’*.” Applicant again submits that Chiang is not related to a min-max problem and requests that the Office identify the authority to ignore technical terms during SSE processing, since the wording relied upon by the Examiner is not in any way equivalent to the technical description of the min-max problem that was provided in the specification.

2A. The Examiner is also requested to provide an explanation for the Examiner’s clear contradiction in paragraph 2.3 of the Examiner’s characterization in paragraph 2.2 that expressly alleges that Chiang does disclose solving the min-max problem in the manner described by claims 5 and 8.

2B. Subsequently, in this same paragraph 2.3, the Examiner then alleges that it would be obvious to “... *modify Chiang et al. to perform the optimization of min-max problems as disclosed in the present invention because both of the inventions are directed toward avoiding getting trapped at local optimal solutions.*”

Applicants respectfully submit that the above-recited rationale would make no sense whatsoever to anyone having ordinary skill in the art. First, the present invention has nothing whatsoever to do with “avoiding getting trapped at local optimal solutions”, since the min-max problem is not even defined in terms of local optimal solutions. Second, even if the present invention were reasonably attempting to avoid getting trapped at local optimal solutions, the fundamental flaw in the above-recited Examiner’s rationale is that the Examiner would clearly be confusing the alleged similar results of two different processings, as opposed to the clearly two different methods of getting to that result. This is a fundamental error in logic that raises the issue of the Examiner’s entire creditability in any aspect of the prosecution of this application.

That is, third, in comparing the description in the specification of the present invention with that described in Chiang, the principle of operation of the present invention is clearly entirely different from that of the mechanism described in Chiang of avoiding getting trapped at local optimal solutions. There is no *prima facie* obviousness rejection established if the principle of operation must be changed to arrive at the claimed invention, as clearly held in *In re Ratti*, as described in MPEP §2143.01: “*If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious.*”

3. In paragraph 3 on page 4 of the Office Action, the Examiner then again contradicts himself by alleging that claims 6 and 7 would be allowable if rewritten in independent format. This position makes no sense whatsoever in view of the Examiner’s statement in paragraph 2.3 that the “... optimization of min-max problems as disclosed in the present invention ...” is obvious over Chiang. Presumably, the Examiner intended to state in paragraph 2.3 that the method described in rejected claims 5 and 8 are obvious over Chiang, not the method of the “present invention.”

4. In paragraph 4 on page 4 of the Office Action, the Examiner also again contradicts himself by indicating that claims 1-4 and 9-21 are allowable over Chiang, since the characterization in paragraph 2.3 clearly states the Examiner’s position that Chiang renders obvious “... *the present invention*” (e.g., not: “... *the invention described by rejected claims 5 and 8*”).

The above-identified inconsistencies in the latest Office Action will have to be addressed and resolved by additional action at the USPTO, since they raise the issue of the entire

credibility of the prosecution to date, including the indication of any allowable subject matter. Applicants do not know whether the SSE after-issue prosecution is a factor in these inconsistencies. As explained to Director Garber, Applicants simply cannot tolerate having Office Actions coming out of the USPTO with these types of errors and expect to be able to enforce any issued patent under scrutiny of these documents by a Court during litigation.

As suggested during this telephone interview with Director Garber, in view of the inherent contradictions in this latest Office Action and the apparent downward direction in the quality of the Office Actions wherein normal constraints of interpretation are being ignored, presumably due to the influence of the SSE phase of prosecution, it might be necessary now to have another Examiner take over prosecution of this application and provide an independent evaluation of the Examiner's statements made in this latest Office Action, so that the record of the SSE prosecution phase be clarified, including that of clarifying the role and authority of the "second set of eyes" processing that has been invoked by the Examiner of record, and whether the Examiner's contradictory statements during the SSE phase of prosecution adversely affects the remainder of the prosecution.

Should the Examiner find the application to be other than in condition for allowance, the Examiner is requested to contact the undersigned at the local telephone number listed below to discuss any other changes deemed necessary in a telephonic or personal interview.

The Commissioner is hereby authorized to charge any deficiency in fees or to credit any overpayment in fees to Assignee's Deposit Account No. 50-0510.

Respectfully Submitted,



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